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No. 99-5739

In the Supreme Court of the United States

DEWEY J. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 844(i) of Title 18, United States Code (Supp. IV 1998), prohibits the arson or attempted arson of "any building" that is "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." This Court granted certiorari on the following question:

Whether, in light of *United States* v. *Lopez*, 514 U.S. 549 (1995), and the interpretive rule that constitutionally doubtful constructions should be avoided, see *DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), Section 844(i) applies to the arson of a private residence; and if so, whether its application to the private residence in the present case is constitutional.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 40-44) is reported at 178 F.3d 479. The opinions of the district court denying petitioner's motion to dismiss the indictment (J.A. 4-7) and his motion for judgment of acquittal (J.A. 23-28) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1999. The petition for a writ of certiorari was filed on August 13, 1999, and was granted on November 15, 1999. 120 S. Ct. 494. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the Constitution, Article I, Section 8, Clause 3, provides:

> The Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.

2. The Necessary and Proper Clause of the Constitution, Article I, Section 8, Clause 18, provides:

> The Congress shall have Power * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

3. Section 844(i) of Title 18, United States Code (Supp. IV 1998), provides:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted on one count of damaging property by means of fire and explosives, in violation of 18 U.S.C. 844(i) (Supp. IV 1998); one count of making an illegal destructive device, in violation of 26 U.S.C. 5861(f); and one count of using a destructive device during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). J.A. 29. He was sentenced to 420 months' imprisonment, to be followed by five years' supervised release, and was ordered to pay restitution of $77,386.87 to the victims' insurer. J.A. 30-39. Petitioner appealed his conviction under Section 844(i), and the court of appeals affirmed. J.A. 40-44.

1. a. Section 844(i) of Title 18, United States Code (Supp. IV 1998), was first enacted as part of Title XI of the Organized Crime Control Act of 1970. See Pub. L. No. 91-452, § 1102, 84 Stat. 958. It established criminal penalties for any person who "maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." 84 Stat. 958; 18 U.S.C. 844(i) (1970).

Title XI emerged from two bills, H.R. 18573 and H.R. 16699, 91st Cong., 2d Sess. (1970), that were introduced by Representative McCulloch in the House of Representatives and were referred to the House Committee on the Judiciary. See 116 Cong. Rec. 35,198 (1970) (statement of Rep. McCulloch); see *Russell* v. *United*

States, 471 U.S. 858, 860 n.5 (1985). Those bills, together with other legislative proposals concerning the regulation of explosives and explosives-related crimes, were the subject of hearings before a House subcommittee during the summer of 1970. See *Explosives Control: Hearings on H.R. 17154, H.R. 16699, H.R. 18573 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970) (*1970 House Hearings*). The House Judiciary Committee added Title XI to a bill (S. 30) previously passed by the Senate, see H.R. Rep. No. 1549, 91st Cong., 2d Sess. 1 (1970) (1970 House Report), and the bill as amended was enacted into law. See 116 Cong. Rec. 35,363 (1970) (passage in House of Representatives); 116 Cong. Rec. 36,296 (1970) (passage in Senate).

H.R. 16699, as initially introduced in the House of Representatives, applied to the destruction by explosives of property "used for business purposes by a person engaged in commerce or in any activity affecting commerce." *1970 House Hearings* at 31. The phrase "for business purposes" was not included, however, in the bill reported by the House Judiciary Committee. The House Report stated:

> Section 844(i) proscribes the malicious damaging or destroying, by means of an explosive, [of] any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce. Attempts would also be covered. Since the term affecting [interstate or foreign] "commerce" represents "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause," *NLRB* v. *Reliance Fuel Corp.*, 83 S. Ct. 312, 371 U.S. 224, 226, 9 L. Ed.2d 279 (1963), this is a very broad provision covering substantially all business property. While this provision is broad, the committee believes that there is no question that it is a permissible exercise of Congress['s] authority to regulate and to protect interstate and foreign commerce. Numerous other Federal statutes use similar language and have been constitutionally sustained in the courts.

1970 House Report at 69-70. Representative McCulloch stated that the provisions of Section 844 had been largely drawn from H.R. 16699, but that the House Judiciary Committee had "extended the provision protecting interstate and foreign commerce from the malicious use of explosives to the full extent of [Congress's] constitutional power." 116 Cong. Rec. 35,198 (1970).[1]

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[1] Section 1106(b)(1) of the Organized Crime Control Act of 1970, 84 Stat. 960, repealed former 18 U.S.C. 837(c) (1964), which provided that possession or use of explosives with the intent to damage or destroy "any building or other real or personal property used for educational, religious, charitable, residential, business, or civic objectives" would create a "rebuttable presumption[] that the explosive was transported in interstate or foreign commerce or caused to be transported in interstate or foreign commerce by the person so possessing or using it, or by a person aiding or abetting the person so possessing or using it." 18 U.S.C. 837(c) (1964). Representative Poff explained:

> This presumption was removed from the bill primarily for two reasons: First, that the presumption itself is of limited utility, because it requires evidence independent of the presumption to sustain it. [Second,] * * * there is the substantial doubt as to the constitutionality of such a presumption. The gentleman is familiar with the decision of the Supreme Court in Tot against United States, and more

b. Section 844(i) was amended in 1982 to add the words "fire or" before the words "an explosive." See Pub. L. No. 97-298, § 2(c), 96 Stat. 1319.[2] The House Report accompanying the 1982 legislation explained that "[t]he current requirement that the damage be 'caused by means of an explosive' results in the allocation of a great deal of investigative resources to proving that fact, even though it has been established that the fire was intentionally set, and the criminal parties may be known." H.R. Rep. No. 678, 97th Cong., 2d Sess. 2 (1982). The Report also noted the existence of a circuit conflict on the question whether the use of gasoline or other flammable liquids to ignite a fire was covered by existing law. *Id.* at 2 & nn.5-6. The House Report stated that "[t]he jurisdictional circumstances enumerated in" Section 844 "otherwise remain unchanged." *Id.* at 1.

c. In *Russell*, this Court held that Section 844(i) reached the attempted arson of a two-unit apartment building used as rental property. See 471 U.S. at 858-

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recently in Leary against United States, which referred to the Tot case.

116 Cong. Rec. 35,359 (1970); see also *1970 House Hearings* at 37 (Justice Department witness states that the presumption in former Section 837(c) "is of dubious validity or value"). Representative Poff's case references are to *Leary* v. *United States*, 395 U.S. 6 (1969), and *Tot* v. *United States*, 319 U.S. 463 (1943). Those cases announce the rule that under the Due Process Clause, "a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." *Leary*, 395 U.S. at 33 (quoting *Tot*, 319 U.S. at 467-468).

[2] The 1982 law made the same change to 18 U.S.C. 844(e), (f), and (h)(1). See Pub. L. No. 97-298, § 2(a) and (b), 96 Stat. 1319.

859. The Court observed that Section 844(i)'s "reference to 'any building . . . used . . . in any activity affecting interstate or foreign commerce' expresses an intent by Congress to exercise its full power under the Commerce Clause." *Id.* at 859. It reasoned that:

> the statute only applies to property that is "used" in an "activity" that affects commerce. The rental of real estate is unquestionably such an activity. * * * [T]he local rental of an apartment unit is merely an element of a much broader commercial market in rental properties. The congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class.

Id. at 862 (footnote omitted). Applying that analysis, the Court concluded that the defendant "was renting his apartment building to tenants at the time he attempted to destroy it by fire. The property was therefore being used in an activity affecting commerce within the meaning of § 844(i)." *Ibid.*

2. Petitioner threw a Molotov cocktail into the Fort Wayne, Indiana, living room of his cousin and the cousin's wife (the Walkers), causing the home to be severely damaged by fire. J.A. 40. He was charged with violating (*inter alia*) Section 844(i). See J.A. 2 (indictment). The district court denied petitioner's motion to dismiss the indictment, relying on prior Seventh Circuit decisions holding that Section 844(i) applies to the damage by fire or explosives of a private residence supplied with natural gas from an out-of-state source. J.A. 4-7.

The government's evidence at trial established three distinct connections between interstate commerce and the home that was damaged by petitioner's crime.

First, an insurance adjuster testified that American Family Insurance, a company headquartered in Wisconsin, had paid a claim under a homeowner's policy for damage done by the fire. J.A. 8-10.[3] Second, an employee of Midland Mortgage Company, headquartered in Oklahoma, testified that the company held a mortgage on the residence and received monthly payments on the mortgage. J.A. 12-14.[4] Finally, employees of the Northern Indiana Public Service Company (Nipsco) testified that the residence was receiving Nipsco natural gas on the date that the fire occurred, and that Nipsco obtained its natural gas from out-of-state sources, including Texas, Louisiana, and Canada. J.A. 15-16. Petitioner was convicted on all charges, see J.A. 29, and the district court denied his post-trial motion for judgment of acquittal, see J.A. 23-28.

3. Petitioner appealed, seeking reversal of his conviction under Section 844(i) on the ground that the statute "exceeds Congress's power under the Com-

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[3] The Presentence Investigation (PSI) Report estimated the loss to the insurer at $77,386.87. PSI Report ¶ 14. Petitioner was ordered to pay restitution to the insurer in that amount. J.A. 36; see 18 U.S.C. 3664(j)(1) (Supp. IV 1998) ("If a victim has received compensation from insurance or any other source with respect to a loss, the [sentencing] court shall order that restitution be paid to the person who provided or is obligated to provide the compensation.").

[4] The mortgage company employee also testified that the Walkers' insurance premiums had been paid to the mortgage company along with the mortgage payments; the mortgage company had then forwarded the premiums to the insurance company. J.A. 13-14. The employee further testified that he had persuaded the insurance company to pay the Walkers' claim for the fire damage when the insurer expressed an initial unwillingness to do so. *Ibid.*

merce Clause * * * when applied to the destruction of a residence rather than a commercial establishment." J.A. 40. The court of appeals affirmed. J.A. 40-44. It observed that "the owner of the residence purchased natural gas in interstate commerce, secured a mortgage from an out-of-state lender, and received an insurance check from an out-of-state insurer." J.A. 41. The court stated that "these interstate connections are pretty slight for a single building," but it concluded that "proof of a small effect will satisfy the statute." *Ibid.*

The court of appeals explained that under this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995),

> any activity that substantially affects commerce may be regulated. Although living in one's own house is not commerce, the residential housing industry is interstate in character. Goods and materials for housing move across state borders; gas and electricity likewise; the financial and insurance markets that provide loans and spread risks have national if not international scope; arson can substantially affect all of these.

J.A. 42. The court relied in part on this Court's decisions in *McLain* v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980), and *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), to support its conclusion that "residential property in the aggregate substantially affects interstate commerce." J.A. 43.

Finally, the court of appeals observed that "[i]f instead of asking whether 'residential real estate' substantially affects commerce we ask whether 'arson of buildings' or even 'arson of residences' substantially affects commerce, the answer still must be yes." J.A. 43. The court cited a Federal Bureau of Investigation

report stating that 19,888 residential buildings were subjected to arson in 1997, and that the average "damage was a little more than $14,000 per residential arson," for a "total of approximately $280 million lost to residential arsons in 1997 alone." *Ibid.* The court noted that "[i]f even a small fraction of the loss is covered by interstate insurance markets, the effect is 'substantial.'" *Ibid.* The court of appeals concluded that "[t]his collective effect, plus proof of a slight connection between the particular arson and interstate commerce, permits the national government to establish substantive rules of conduct." J.A. 44.

SUMMARY OF ARGUMENT

I. The federal arson statute, 18 U.S.C. 844(i), applies to the arson of the residential property in this case.

A. The phrase "affecting interstate or foreign commerce" is a term of art with an established legal significance. By employing that phrase in Section 844(i), Congress unambiguously expressed its intent to exercise the full scope of its Commerce Clause authority to protect property used in activities affecting interstate commerce from criminal damage or destruction by fire or explosives. Petitioner's contention that the statute should be construed in a manner that avoids close constitutional questions is directly at odds with that congressional intent.

B. Application of Section 844(i) to petitioner's conduct is consistent both with the text of the statute and with the purpose of the jurisdictional element. The underwriting and servicing of mortgage loans, the issuance and administration of casualty insurance policies, and the supply and consumption of natural gas are all "activit[ies] affecting interstate or foreign commerce." The Walkers' residence was "used" in

those activities under a common-sense understanding of that term. That is particularly evident in light of this Court's decision in *Russell* v. *United States*, 471 U.S. 858 (1985), which establishes that residential property is covered by Section 844(i) if it is employed as an investment resource, whether or not its occupants are engaged in any commercial pursuit. The interstate connections proved in this case substantially further the purpose of Section 844(i)'s jurisdictional element. They establish that the Walkers' property was used in such a manner that its destruction or damage by fire could reasonably be expected to have a direct impact on interstate commerce.

C. Contrary to petitioner's contention, the legislative history does not suggest that Congress intended to exclude owner-occupied residential property from the coverage of Section 844(i). To the contrary, the relevant legislative materials make clear that Congress intended to exercise the full extent of its Commerce Clause authority. Some members of Congress believed that the protection of private residences from arson lay beyond congressional control. Such members would logically have concluded that the statute would not cover such arsons, because the coverage of Section 844(i) reached no farther than the sweep of Congress's power under the Commerce Clause. But nothing in the legislative record suggests that Congress intended to exclude any building used in an activity that brings it within federal protection as a constitutional matter.

II. The application of Section 844(i) here is constitutional.

A. Congress's authority "[t]o regulate Commerce * * * among the several States" includes the power to regulate intrastate noncommercial activity that substantially affects interstate commerce. This Court's

decision in *Russell* makes clear that Section 844(i) is constitutional as applied to a building used to generate revenue for an owner who rents it as a residence. Congress has the power to punish violent acts that are committed for non-economic reasons but that can be expected to have a sufficiently direct deleterious effect on interstate commerce.

B. As applied in the present case, Section 844(i)'s jurisdictional element ensures that the statute is limited to property, and offenses, having a constitutionally sufficient nexus to interstate commerce. Contrary to petitioner's contention, the connections between petitioner's crime and interstate commerce are neither attenuated nor speculative. Most significantly, the damage caused by petitioner's unlawful conduct triggered a legal duty for a Wisconsin insurer to pay over $75,000 to persons in another state. The crime also directly threatened the mortgagee's ability to use the property as security for the outstanding debt, and it created a substantial risk that interstate natural gas deliveries would be interrupted.

C. As this Court recognized in *United States* v. *Lopez*, 514 U.S. 549 (1995), to permit Congress to regulate all activity that might have some indirect or remote downstream effect on interstate commerce would improperly vest plenary power in the national government. The precise limits on the Commerce Clause power, however, turn on matters of degree, not on bright-line formulas. There is nothing impermissible in federal regulation of violent conduct that exposes identified out-of-state business enterprises to economic harm. Nor does it exceed Congress's power to punish conduct that is foreseeably likely to interrupt or diminish sales of out-of-state natural gas to a home,

since the aggregate interstate commercial effects of all such reductions would be substantial.

Where a Commerce Clause statute includes an "affecting commerce" jurisdictional element, there are a variety of forms of connections to interstate commerce that may satisfy the Constitution. That some genuine nexus must exist, however, does not mean that the government must prove an *actual effect* on commerce in every Section 844(i) prosecution. Still less is there a constitutional requirement that the government must prove a "substantial effect" in each case. Indeed, this Court in *Russell* affirmed the defendant's conviction for an unsuccessful attempt to set fire to a single rental building. The applications at issue in *Russell* and this case are valid because they protect interstate markets and businesses against the harms that flow directly and significantly from criminal destruction of property. The coverage of the statute is broad, but that is consistent with Congress's authority to safeguard the interstate economy and the firms that do business in it from the predictable financial harms that are the consequence of crimes against property.

ARGUMENT

I. SECTION 844(i) CANNOT REASONABLY BE CONSTRUED TO CONTAIN A CATEGORICAL EXCLUSION OF OWNER-OCCUPIED PRIVATE RESIDENCES

A. Congress Unambiguously Expressed Its Intent To Extend Section 844(i) To The Full Scope Of Its Authority Under The Commerce Clause

This Court has repeatedly recognized that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will

construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Relying on that canon of construction, petitioner argues (Br. 15-17) that unless the text and history of Section 844(i) reveal an unambiguous congressional intent to cover the private residence that was victimized by his crime, his conviction must be reversed. That argument misconceives the analysis that applies where (as here) Congress has unambiguously signaled its intent to exercise the full scope of its constitutional authority.

As the Court explained in *United States* v. *Darby*, 312 U.S. 100 (1941),

> this Court ha[s] many times held that the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it.
>
> In such legislation Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated * * * have such effect * * *, or whether they come within the statutory definition of the prohibited Act * * *. And sometimes Congress itself has said that a particular activity affects the commerce.

Id. at 119-120 (footnote omitted). Thus, Congress might have chosen to define, in the text of Section 844(i), the

specific categories of real and personal property that it found bore a sufficient connection to interstate commerce to warrant federal protection. But Congress chose instead to entrust the courts with the determination of whether particular kinds of property bear the requisite commercial nexus.

The "affecting commerce" standard that Congress selected had a well-established legal significance. As a matter of statutory construction, this Court has consistently distinguished between laws confined to activities "in" commerce and the more expansive laws that extend to activities "affecting" commerce. See *Russell* v. *United States*, 471 U.S. 858, 859 n.4 (1985); *Scarborough* v. *United States*, 431 U.S. 563, 571 (1977); *United States* v. *American Bldg. Maintenance Indus.*, 422 U.S. 271, 280 (1975). When Congress legislates solely with respect to activities "in" commerce, the statute will ordinarily be construed to reach only those activities that are actually within the flow of commerce or directly connected with it. See, *e.g.*, *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 194-195 (1974). Use of the phrase "affecting interstate commerce," by contrast, reflects congressional intent to exercise "the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause." *NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (per curiam); accord, *e.g.*, *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 273 (1995); *Russell*, 471 U.S. at 859 & n.4; *Scarborough*, 431 U.S. at 571-572; *American Bldg. Maintenance*, 422 U.S. at 280; *Polish National Alliance* v. *NLRB*, 322 U.S. 643, 647 (1944) ("[W]hen [Congress] wants to bring aspects of commerce within the full sweep of its constitutional authority, it manifests its purpose by regulating not only 'commerce' but

also matters which 'affect,' 'interrupt,' or 'promote' interstate commerce.").

Congress was well aware that its employment of the "affecting commerce" standard in Section 844(i) reflected an intent, in light of this Court's cases, to invoke the full jurisdictional authority that Congress possesses under the Commerce Clause.[5] See 1970 House Report at 69-70. The Court in *Russell* recognized that "[t]he reference [in Section 844(i)] to 'any building . . . used . . . in any activity affecting interstate or foreign commerce' expresses an intent by Congress to exercise its full power under the Commerce Clause." 471 U.S. at 859. In light of Congress's clearly stated intent, petitioner's request for a narrowing construction of the statute must be rejected. The canon that ambiguous statutes will be construed so as to avoid grave constitutional questions "is followed out of respect for Congress, which [the Court] assume[s] legislates in the light of constitutional limitations. It is qualified by the proposition that avoidance of a difficulty will not be pressed to the point of disingenuous evasion." *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991) (citation and internal quotation marks omitted).

By employing the phrase "affecting interstate or foreign commerce," Congress in Section 844(i) expressed its unambiguous intent to exercise the full

[5] Precisely speaking, Section 844(i) was intended to exercise all of Congress's commerce power based on the *uses* of the property involved in the offense. Congress could also have used its commerce power to criminalize conduct based on the defendant's movement in commerce, cf. 18 U.S.C. 1952, the incendiary material's or the explosive's movement in commerce, cf. 18 U.S.C. 922(a), or the effects on commerce of the arson itself, cf. 18 U.S.C. 2332a(a)(2) (Supp. IV 1998).

scope of its authority under the Commerce Clause to protect property used in activities affecting interstate commerce against criminal destruction by fire or explosives. The necessary consequence of that mode of statutory draftsmanship is that in close cases the applicability of Section 844(i) will turn on judicial resolution of difficult constitutional questions. Petitioner's proposed narrowing construction—which would in essence limit Section 844(i)'s coverage to those buildings and other property that are *indisputably* suitable for federal protection under the Commerce Clause—ignores the settled legal significance of the phrase "affecting commerce." Given Congress's use of that established term of art, a judicial preference for avoiding close constitutional questions would not show respect for Congress's intention; it would instead disregard Congress's purpose to legislate to the limit of its constitutional authority.

Adopting a narrowing construction in this case is unnecessary to avoid the danger that an Act of Congress will be held unconstitutional. Cf. *DeBartolo*, 485 U.S. at 575 (rule that ambiguous statutes will be construed to avoid constitutional difficulties is based in part on the principle that "courts will * * * not lighty assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it"). If this Court reaches the constitutional question in this case, and concludes that the residence damaged by petitioner lacked a sufficient nexus to commerce to justify federal protection, it will hold that Section 844(i) does not apply to petitioner's conduct—not that the statute is invalid. Indeed, the whole point of an "affecting commerce" element is to allow Congress to exercise its full constitutional authority without the danger of overreaching, by

ensuring that the statute sweeps neither more nor less broadly than the Commerce Clause permits.

B. Application Of Section 844(i) To Petitioner's Conduct Is Consistent Both With The Text Of The Statute And With The Purpose Of The Jurisdictional Element

Section 844(i) prohibits the malicious damage or destruction, by means of fire or explosives, of "*any* building, vehicle, or other real or personal property used in interstate or foreign commerce or in *any* activity affecting interstate or foreign commerce." 18 U.S.C. 844(i) (Supp. IV 1998) (emphasis added). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzalez*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). Use of the word "any" strongly suggests that Congress did not intend a categorical exclusion of any class of buildings or other property; rather, a building or property of whatever sort is covered if it is shown to bear the requisite connection to interstate commerce. Petitioner does not appear to dispute that the residence damaged by his unlawful conduct was a "building" within the meaning of the statute. See, *e.g.*, *Webster's Third New International Dictionary* 292 (1976) ("[B]uilding: * * * a constructed edifice * * * serving as a dwelling * * * or other useful structure."). His argument (Br. 14) that "Section 844(i) does not apply to arson of a private residence" would have the practical effect, however, of creating the sort

of categorical exclusion that Congress declined to write into the law.[6]

The residence involved in this case was mortgaged to an Oklahoma lender, was insured by a Wisconsin insurer, and received natural gas from sources outside the State of Indiana. See J.A. 25, 41. The underwriting and servicing of mortgage loans, the issuance and administration of casualty insurance policies, and the supply of natural gas are all "activit[ies] affecting interstate or foreign commerce." 18 U.S.C. 844(i) (Supp. IV 1998). See, *e.g.*, *McLain* v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 245 (1980) (financing of residential property); *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 538-539 (1944) (fire insurance); *Illinois Natural Gas Co.* v. *Central Ill. Pub. Serv. Co.*, 314 U.S. 498, 503-504 (1942) (distribution of natural gas). As we explain below, the Walkers' home was "used" in those activities under a common-sense understanding of that term.

A central theme of petitioner's brief is that the links to commerce identified in this case are arbitrary or unreal—that they have no functional bearing on the

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[6] Congress's intent not to exclude residential property per se is also supported by 18 U.S.C. 844(e) (Supp. IV 1998). Section 844(e) establishes criminal penalties for any person who "through the use of the mail, telephone, telegraph, or other instrument of interstate or foreign commerce, willfully makes any threat * * * unlawfully to damage or destroy any building, vehicle, or other real or personal property by means of fire or an explosive." 18 U.S.C. 844(e) (Supp. IV 1998). Because Section 844(e) does not require proof of any connection between the building (or other property) and interstate commerce, it applies unambiguously to a threat to destroy a private residence, if that threat is made by the specified jurisdictional means. The natural inference is that Congress also intended Section 844(i) to cover similar property if the jurisdictional nexus in that provision is satisfied.

question whether the physical integrity of the Walkers' residence was an appropriate subject of federal concern. That argument is incorrect. The interstate connections proved in this case substantially further the purpose of Section 844(i)'s jurisdictional element. They establish that the Walkers' property was used in such a manner that its destruction or damage by fire could reasonably be expected to have a direct and concrete impact on interstate commerce.

1. The real property at issue in this case was "used" by the Walkers as collateral to obtain and secure their mortgage loan. It was also "used" by the mortgage company as security for the outstanding indebtedness. The mortgagee—an Oklahoma company engaged in interstate commerce—retained a property interest in the mortgaged real estate and a direct financial stake in the physical integrity of the Walkers' residence. Destruction of the home by fire presumably would not affect the Walkers' legal obligation to repay the loan, but it might well impair their practical ability to do so, and it would sharply diminish the value of the company's security in the event of borrower default.

This Court's decision in *Russell* makes clear that residential property is "used" in an "activity affecting interstate or foreign commerce" if it is employed as an investment resource, whether or not its *occupants* are engaged in any commercial pursuit. Thus, the *Russell* Court concluded that the defendant in that case "was renting his apartment building to tenants at the time he attempted to destroy it by fire. The property was therefore being used in an activity affecting commerce within the meaning of § 844(i)." 471 U.S. at 862. Although the bulk of petitioner's statutory argument is devoted to the proposition (Br. 14) that "Section 844(i) does not apply to arson of a private residence," petitioner appears to accept this Court's holding in *Russell*, and at one point he acknowledges (Br. 19) that a person can "use" residential property by "rent[ing it] out for profit." Petitioner thus concedes that residential property is "used" in an "activity affecting interstate or foreign commerce" if its occupant pays rent to a landlord. But he asserts that the property is not so used if the occupant has pledged the residence as security for an outstanding debt and makes monthly mortgage payments to a commercial enterprise as a condition of avoiding foreclosure. Petitioner offers no basis, however, for believing that the 1970 Congress (or any reasonable legislature) would have wished to cover one use of real property but not the other, analogous use.

An employee of the Midland Mortgage Company testified that the company suffered no financial loss as a result of the fire in this case. See J.A. 14. That was so, however, because the company had protected its interests by forwarding the Walkers' insurance premiums to the Wisconsin insurer, and by interceding when the insurer appeared unwilling to pay the claim. See J.A. 12-14. Indeed, the mortgage company's active role in the administration of the Walkers' insurance policy attests to the mortgagee's recognition of its own economic stake in the physical integrity of the residence.

2. The Walkers' residence was also "used" in the underwriting and administration of casualty insurance, since the home was the very subject of the insurance agreement.[7] The insurance policy served not only to

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[7] During congressional hearings on the 1982 amendments to Section 844 (which extended the statute's coverage to damage or destruction caused by "fire," see p. 6, *supra*), an insurance industry

safeguard the Walkers' interests, but also to protect the mortgagee's security for the outstanding indebtedness. The policy was thus an integral feature of the use of the property as collateral for the mortgage loan. The fact that a home is insured by an out-of-state company gives rise to a reasonable expectation that its damage or destruction by fire may have a tangible impact on interstate commerce. That possibility materialized in the instant case: petitioner's criminal conduct, and the consequent damage to the Walkers' home, triggered a legal obligation for the insurer to make a payment of more than $75,000 across state lines.

3. The Walkers' home was also "used" in the "activity" of supplying natural gas. The conversion of gas into heat depends on the existence and proper operation of appropriate piping and other physical equipment—including the controls that regulate the volume of gas utilized—within the house itself. Any other segment of a gas company's pipelines would surely constitute property "used" in the provision of natural gas, and there is no basis for a different characterization of the equipment located within the residence. The residence was also "used" in activities that consume natural gas; the volume of gas provided to the residence depended on the activities of the occupants within it. Proof that a house receives interstate natural gas is directly related to the purpose of Section 844(i)'s jurisdictional element, since such proof

representative testified about the costs to the industry resulting from arson fires and provided the subcommittee with an industry report on the subject. See *Anti-Arson Act of 1982: Hearing on H.R. 6377 and H.R. 6454 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 39-79 (1982). Congress was thus well aware that financial loss to insurers was among the harms caused by conduct violative of Section 844(i).

evidences a substantial likelihood that the completed crime would interfere with interstate commerce. Destruction of the house, or damage sufficient to cause the residents to vacate the premises, would lead inevitably to a reduction in the quantity of gas shipped in interstate commerce. See J.A. 41-42; *United States* v. *Hicks*, 106 F.3d 187, 189 (7th Cir. 1997).[8]

4. Finally, the term "used" should be construed in a manner that effectuates Congress's overriding intent—expressed both through Section 844(i)'s use of a term of art ("affecting commerce") having a settled legal significance, and through the Section's expansive coverage of "any" building or property having the requisite commercial nexus—to exercise the full scope of its Commerce Clause authority. That a residence is in one sense quintessentially private (in that it is typically the site of an individual's most intimate activities) should not obscure the fact that a house *qua* physical structure is a substantial *economic* asset. Its damage by fire or explosives will often have significant financial consequences for a variety of interstate commercial actors. Congress has a valid basis in the Commerce Clause to

[8] As petitioner observes (Br. 6), the government did not present direct evidence concerning the effect of the fire on the Walkers' consumption of natural gas. The insurance claim paid to the Walkers, however, included slightly over $10,000 for "living expenses for the family while the home was being repaired." PSI Report ¶ 14. It is a fair inference from the record that the Walkers were forced to vacate the premises for a significant period of time, and that the volume of natural gas dispensed to the residence accordingly decreased. In any event, Section 844(i)'s jurisdictional element does not require case-specific proof of an actual effect on commerce. The defendant in *Russell*, for example, was convicted of an *unsuccessful attempt* to set fire to residential property. 471 U.S. at 859 & n.1.

protect those interests, whether the residential property is rented or occupied by its owner.[9]

[9] In *United States* v. *Mennuti*, 639 F.2d 107 (2d Cir. 1981), the court of appeals held that damage or destruction of a private dwelling is not reached by Section 844(i), because the statute was limited to "business property *used* in interstate or foreign commerce or in an activity affecting such commerce." *Id.* at 111. Judge Friendly's opinion for the court in that case, however, has been superseded by this Court's decision in *Russell*. See *United States* v. *Ramey*, 24 F.3d 602, 607 (4th Cir. 1994) (discussing inconsistency between *Russell* and *Mennuti*), cert. denied, 514 U.S. 1103 (1995); *United States* v. *Shively*, 927 F.2d 804, 808 (5th Cir.) (same), cert. denied, 501 U.S. 1209 (1991); *United States* v. *Stillwell*, 900 F.2d 1104, 1109-1110 (7th Cir.) (same), cert. denied, 498 U.S. 838 (1990). *Mennuti* assumed that the activities of daily living by the occupants of the property were the *only* relevant activities that could be considered. 639 F.2d at 110 (finding it insufficient that "a dwelling was advertised for rental, and that a lessee might come from without the state"). That assumption was later contradicted by this Court's decision in *Russell*, in which the Court held that arson of residential property *is* covered when it is used as rental property. *Russell* thus makes clear that uses of the building by persons other than the occupants (the owners, in *Russell* itself) are relevant. In light of *Russell*, uses of the property by other businesses (such as mortgage lenders) are also relevant. The *Mennuti* court may also have been led astray by the statement in the House Committee report that Section 844(i) covers "substantially all business property." See *Mennuti*, 639 F.2d at 111 (discussing 1970 House Report at 69-70). The court overlooked that Congress deliberately deleted language from an earlier bill that would have expressly limited Section 844(i) to property used for "business purposes." See pp. 25-27, *infra*.

C. The Legislative History Of Section 844(i) Does Not Support Any Categorical Exclusion Of Owner-Occupied Residential Property

Petitioner also contends (Br. 27-28) that the legislative history of the Organized Crime Control Act of 1970 reflects a congressional intent to exclude residential property from the coverage of Section 844(i). That argument is incorrect. Far from supporting petitioner's reading of the statute, the relevant legislative materials make clear that Congress intended to exercise the full extent of its Commerce Clause authority. Certain members of Congress may have doubted that Congress's constitutional powers extended to prohibiting the bombing of private residences, and may therefore have believed that as a practical matter the statute would not cover such crimes. But nothing in the legislative history suggests that Congress intended to exclude any building or other property with a sufficient nexus to commerce to satisfy constitutional requirements.

1. H.R. 16699 was originally drafted to cover property used in activities "affecting interstate or foreign commerce" only if the property was used "for business purposes." A Justice Department witness defended that restriction on the ground that "[w]e wanted to make sure that it was property used for business purposes, not the home of a businessman who is head of a corporation which has engaged in interstate business. We don't want to protect his home. We want to just protect the business." *1970 House Hearings* at 74. Representative Wilson then stated that "[t]he reason, of course, for not protecting the home is the basic Federal jurisdiction of interstate commerce." *Ibid.* The subcommittee heard other testimony,

however, that a limitation of coverage to business property was too restrictive because terrorists had recently bombed schools, police stations, and churches (buildings that might not be considered "business property"). Other members thus expressed the view that private residences and other noncommercial property ought to be covered. See *id.* at 289 (Rep. Goldwater states: "I believe this bill should include any building, vehicle or any real property * * * not just businesses."); *id.* at 300-301 (Rep. Wylie argues that the bill should cover all buildings, including a "private dwelling or a church or other property not used for business," and that such legislation would be permissible under the Commerce Clause); *id.* at 304-305 (Rep. Cramer states that the bill "should be broadened to include any destruction of property" without exception because "a person has a right to safety and security of his home and to the security of his property").

The bill subsequently reported by the House Judiciary Committee (and ultimately enacted by Congress) did not contain the limiting phrase "for business purposes." The bill's sponsor stated, with apparent reference to that change, that "the committee extended the provision protecting interstate and foreign commerce from the malicious use of explosives to the full extent of our constitutional power." 116 Cong. Rec. 35,198 (1970) (statement of Rep. McCulloch); see also *id.* at 37,187 (Rep. MacGregor states: "Nearly all types of property will now be protected."). Petitioner's proposed exclusion of owner-occupied residential property would resurrect the "business purposes" limitation, contrary to the well-established principle that "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not

intended." *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983).

Examination of the relevant 1970 legislative debates reveals uncertainty within Congress over the precise scope of its constitutional power to proscribe explosives-related crimes at non-business locations. The legislation ultimately enacted did not purport to resolve that uncertainty. Congress declined to limit Section 844(i)'s reach to property "used for business purposes." Congress also declined to make a statutory "finding" that particular categories of explosives-related crimes (including crimes against residential property) would have the requisite nexus to interstate commerce.[10] Instead, Congress "left it to the courts to determine" whether particular property has the requisite nexus to commerce, see *Darby*, 312 U.S. at 120, while making clear that it intended to exercise the full extent of its authority under the Commerce Clause. See pp. 4-5, *supra*. An individual member who believed that the bombing of private residences lay beyond congressional control would logically have concluded that Section 844(i) did not cover such residences. But no member suggested that the text of Section 844(i) imposed limitations on the scope of covered property beyond those imposed by the Constitution itself.[11]

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[10] When Representative Wylie stated that "Congress can in and of itself make a finding that a specific act involves interstate commerce if it so desires," Representative Celler responded, "We can make a declaration but will the Supreme Court sustain us?" *1970 House Hearings* at 301.

[11] Petitioner's reliance (Br. 28) on the 1970 repeal of former 18 U.S.C. 837(c) (1964) is wholly without basis. Former Section 837(c) applied broadly to "any building or other real or personal property used for educational, religious, charitable, residential, business, or civic objectives." Petitioner's statement (Br. 28) that "[c]onsti-

2. The House Report accompanying the Organized Crime Control Act contained the following description of Section 844(i): "Since the term affecting [interstate or foreign] 'commerce' represents 'the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause,' *NLRB* v. *Reliance Fuel Corp.*, 83 S. Ct. 312, 371 U.S. 224, 226, 9 L.Ed.2d 279 (1963), this is *a very broad provision covering substantially all business property.*" 1970 House Report at 70 (emphasis added). Relying on the italicized language, petitioner argues (Br. 27) that Section 844(i) covers only a subset of "business property" and does not cover residential property at all. Petitioner's reliance on the House Report is misplaced.

To begin with, the opening clause of the same sentence evidences the Committee's awareness of the meaning repeatedly ascribed by this Court to the phrase "affecting commerce." That clause confirms the most natural reading of the statutory language—*i.e.*, that Congress intended to prohibit damage by explosives to real and personal property used in activities affecting interstate commerce to the maximum extent authorized by the Constitution. The language on which petitioner relies, by contrast, has no counterpart in the text of the statute. Indeed, that language tracks almost precisely the Justice Department's description of H.R. 16699 at a time when that bill contained the "business purposes" limitation. See *1970 House Hearings* at 37 (Justice Department witness testifies that the relevant

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tutional concerns motivated the repeal" is literally accurate. Those constitutional concerns, however, involved Due Process Clause constraints on Congress's authority to establish evidentiary presumptions; they had nothing to do with perceived limitations on congressional power under the Commerce Clause to protect residential property. See note 1, *supra*.

provision of H.R. 16699 "would cover damage by explosives to substantially any business property"). The House Report's reference to "business property" may well have been inadvertent; in any event, it cannot be regarded as an explication of the language that Congress actually enacted into law.

In any event, the House Report's statement that Section 844(i) covers "substantially all business property" need not be construed (as petitioner would construe it) to imply that *only* business property is covered. The statement may be understood as providing an important example of the property that Section 844(i) covers. That is particularly so in light of the fact that Congress specifically considered and disapproved the proposed "business purposes" limitation.

3. On the date that the House of Representatives passed the Organized Crime Control Act, the following exchange occurred on the House floor:

> Mr. HUNGATE. Mr. Chairman, is there anywhere in [the bill] which would provide for an investigation where there was a bombing of a residence—not in interstate commerce?
>
> Mr. CELLER. There is none today and you must remember that *the mere bombing of a private home* even under this bill *would not be covered because of the question of whether the Congress would have the authority under the Constitution.* We limit it to federally owned property and federally controlled property that has been the recipient of a grant of Federal funds or that is financially connected with the Federal Government, like airports, universities, and various installations of the Government.

116 Cong. Rec. 35,359 (1970) (emphasis added). Petitioner's reliance (Br. 28) on the italicized language is misplaced.

Most obviously, Representative Celler was wrong in describing the bill reported by the House Judiciary Committee, and subsequently passed by Congress, as limited to property owned, controlled, or funded by the federal government. While Section 844(f) reaches federal property, Section 844(i) reaches property in or affecting interstate commerce. Representative Celler may have been thinking of his own proposed legislation to prohibit bombings—which did not contain any provision comparable to Section 844(i)—when he stated that the bill reached only federal property and did not apply to residences. See *1970 Hearings* at 3, 21-23.

Even if Representative Celler is assumed to have taken account of Section 844(i), his statement is properly regarded as an assertion that bombing of private residences is beyond the scope of Congress's constitutional authority. A congressman who understood that the phrase "affecting commerce" invoked the full reach of Congress's power, and who believed that Congress lacked power to prohibit the bombing of private homes, could quite logically state that Section 844(i) would not cover such bombings. That statement would not mean that Congress had so limited the range of property subject to federal protection, but that the Constitution was thought to do so.[12]

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[12] During the subcommittee hearings, Representative Cramer proposed that the bill be expanded to cover all real and personal property. *1970 House Hearings* at 304-305. Representative Celler responded: "I am as anxious as you to proscribe all bombings. I am a little concerned whether or not the Congress has that power." *Id.* at 305. Congress's use of the phrase "affecting interstate or foreign commerce" is precisely tailored to meet the concerns of a

Thus, even if it were otherwise authoritative, Representative Celler's statement would provide no basis for this Court to construe Section 844(i) to avoid the constitutional question raised in this case. The relevant question is whether arson of private residences may be subject to federal control—not whether some members of the Congress that enacted Section 844(i) believed that it possessed such power. Cf. *Allied-Bruce Terminix Cos.*, 513 U.S. at 275 ("The pre-New Deal Congress that passed the [Federal Arbitration] Act in 1925 might well have thought the Commerce Clause did not stretch as far as has turned out to be the case. But, it is not unusual for this Court in similar circumstances to ask whether the scope of a statute should expand along with the expansion of the Commerce Clause power itself, and to answer the question affirmatively.").

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member who doubts Congress's power to proscribe the bombing of private residences (and therefore could not conscientiously support a bill that expressly imposed such a prohibition), but who regards such a prohibition as desirable. The Seventh Circuit has observed that

> in reaching his conclusion, Representative Celler did not rely on congressional intent to exclude private homes. Rather, he relied on the fact that Congress may not have the power under the commerce clause to reach private homes. The inference is that if a private residence did have a sufficient connection with interstate commerce to satisfy the commerce clause, the statute would cover that residence.

United States v. *Stillwell*, 900 F.2d at 1109.

II. SECTION 844(i) IS CONSTITUTIONAL AS APPLIED TO THE FACTS OF THIS CASE

A. Congress May Prohibit Intrastate Violent Conduct Committed For Non-Economic Motives, So Long As The Conduct Has A Sufficiently Direct And Significant Connection To Interstate Commerce

1. It is well established that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Darby*, 312 U.S. at 118. See also, *e.g.*, *Fry* v. *United States*, 421 U.S. 542, 547 (1975) ("Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations."); *Perez* v. *United States*, 402 U.S. 146, 150 (1971).[13]

[13] The power to regulate intrastate activity that has a substantial effect on interstate commerce is confirmed by Congress's constitutional authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers. U.S. Const. Art. I, § 8, Cl. 18; see *New York* v. *United States*, 505 U.S. 144, 158-159 (1992) ("The Court's broad construction of Congress' power under the Commerce * * * Clause[] has of course been guided * * * by the Constitution's Necessary and Proper Clause.").

The regulated activity need not itself be commercial. "[E]ven if [the] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Wickard* v. *Filburn*, 317 U.S. 111, 125 (1942); see also, *e.g.*, *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 121 (1942) ("It is the effect upon interstate commerce or upon the exercise of the power to regulate it, not the source of the injury which is the criterion of Congressional power."). "The fundamental principle is that the power to regulate commerce is the power to enact all appropriate legislation for its protection and advancement; to adopt measures to promote its growth and insure its safety; to foster, protect, control and restrain." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937) (citations and internal quotation marks omitted).

2. This Court's decision in *Russell* establishes that Section 844(i) is constitutional as applied to a residential building used in profit-making activities. The Court in *Russell* recognized that Congress's coverage of buildings under Section 844(i) "exercise[d] its full power under the Commerce Clause." 471 U.S. at 859. The Court also observed that "[t]he congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class." *Id.* at 862. That statement was supported by citation to this Court's constitutional decision in *Perez*. See *id.* at 862 n.11. The *Russell* Court's reference to the scope of "congressional power" in this area, and its citation to *Perez*, make clear that the Court's analysis was not limited to statutory construction, but also expressed a

judgment about the nature of the constitutionally permissible applications of the statute.

The constitutional judgment in *Russell* is that Congress may prohibit violent acts directed at even local properties, when the involvement of those properties in commercial markets means that damage to those properties poses a realistic threat to interstate commerce. In *Russell*, the fact that a local property was rented put that property into "[the] much broader commercial market in rental properties." 471 U.S. at 862. While a single act of malicious damage, or even destruction, of one rental property would not necessarily have substantial or identifiable interstate effects, the rental economy as a whole is made up of such individual units, and if Congress cannot protect the parts, it would be powerless to protect the whole. *Russell* makes clear that Congress is not so limited in its power.

This Court's decision in *Lopez* does not cast doubt on that principle recognized in *Russell*. In *Lopez*, this Court recognized (as the second of three categories of permissible Commerce Clause regulation) that "Congress is empowered to regulate *and protect* the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." 514 U.S. at 558 (emphasis added). That language, and the accompanying reference to a federal statute that prohibits "the destruction of an aircraft," *ibid.* (quoting *Perez*, 402 U.S. at 150), make clear that Congress has authority to prohibit violent non-economic conduct that directly threatens property having connections to interstate commerce.

The same principle logically applies to regulation under the third category recognized in *Lopez*, *i.e.*,

"regulation[] of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect[] interstate commerce." 514 U.S. at 561; see also *id.* at 558-559. In order to protect interstate commerce effectively, Congress must have power to restrain intrastate violence that, although undertaken for non-economic motives, is connected in a significant way with commercial transactions.[14] And that is true even if the particular property victimized by crime is not at the time of the criminal act

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[14] That point is implicit in *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249 (1994). While not a constitutional decision, the reasoning in *Scheidler* reflected the Court's recognition that entities that engage in criminal conduct directed at commercial ventures may themselves constitute entities that "affect" commerce. *Id.* at 257-258 (holding that an "enterprise" whose activities affect commerce under the RICO statue, 18 U.S.C. 1961 *et seq.*, need not itself have an economic or profit-making motive, but rather may "affect interstate or foreign commerce" by having "a detrimental influence" on commercial entities engaged in such commerce—in that case, through the alleged extortionate acts of protesters directed at an abortion clinic's personnel and patients).

Since this Court's decision in *Lopez*, several courts of appeals have considered constitutional challenges to the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. 248, which prohibits various forms of interference with access to reproductive health services. Those courts have uniformly upheld the Act, on the theory that Congress has Commerce Clause power to prevent the obstruction of commercial transactions, even where the conduct proscribed by the statute is undertaken for non-economic motives. See, *e.g.*, *Hoffman* v. *Hunt*, 126 F.3d 575, 587 (4th Cir. 1997), cert. denied, 523 U.S. 1136 (1998); *Terry* v. *Reno*, 101 F.3d 1412, 1417 (D.C. Cir. 1996), cert. denied, 520 U.S. 1264 (1997); *United States* v. *Dinwiddie*, 76 F.3d 913, 920-921 (8th Cir.), cert. denied, 519 U.S. 1043 (1996); *United States* v. *Wilson*, 73 F.3d 675, 684-685 (7th Cir. 1995), cert. denied, 519 U.S. 806 (1996); *Cheffer* v. *Reno*, 55 F.3d 1517, 1520 n.6 (11th Cir. 1995).

devoted to commercial activity, or itself on the market for rent or sale. Provided that the link to commerce is close enough, Congress may regulate non-economic activity (such as violent crime) based on its anticipated interstate commercial effects.

B. The Effects On Interstate Commerce In This Case Were Specific And Concrete

In *Lopez*, this Court considered a constitutional challenge to the Gun-Free School Zones Act, former 18 U.S.C. 922(q) (Supp. V 1993), which generally proscribed the possession of guns in and near schools. The government contended that the Section 922(q) was a permissible exercise of congressional power under the Commerce Clause. The government argued that the conduct prohibited by the Section 922(q) bore a constitutionally sufficient nexus to interstate commerce because the presence of guns within school zones would disrupt the educational process, resulting in a less productive citizenry and (ultimately) in an impaired national economy. See 514 U.S. at 564.

In holding the statute to be invalid, this Court observed that Section 922(q) "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession * * * affects interstate commerce." 514 U.S. at 561; see also *id.* at 562 (Section 922(q) "has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce"). The Court also found the predictive chain described by the government to be too attenuated to serve as a basis for federal legislation under the Commerce Clause. It concluded that "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power." *Id.* at 567.

In contrast to Section 922(q), Section 844(i) contains an express jurisdictional element that "limit[s] its reach" (*Lopez*, 514 U.S. at 562) to property that is "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." Petitioner argues (Br. 48), however, that in the present case "[t]he connections between the property and interstate commerce—much less between the potential effects of the crime and interstate commerce—are remote and insignificant in quality." He contends (Br. 44-50) that if Section 844(i)'s jurisdictional element is read to encompass such connections, the statute is unconstitutional.

Petitioner's constitutional claim is without merit. In this section, we show that the connections between petitioner's crime and interstate commerce are neither attenuated nor speculative. In the next section, we show that protection of the property of the type involved in this case bears a constitutionally sufficient nexus to interstate commerce, and thus renders a statute prohibiting the destruction of such property a permissible exercise of federal power.

1. Most obviously, the damage caused by the fire triggered a legal duty for a Wisconsin insurer to pay over $75,000 to persons in another State. The economic injury done to the insurer was no less substantial or concrete than if petitioner had set fire to the insurance company's offices. The directness of the injury is attested to by the fact that the sentencing court, in accordance with 18 U.S.C. 3664(j)(1) (Supp. IV 1998), ordered petitioner to pay restitution to the insurer. See

note 3, *supra*. The insurance company's right to restitution in the sentencing process is consistent with established equitable principles, under which the insurer could have filed a private civil action against petitioner to recoup the money paid on the Walkers' claim.[15] There is consequently no basis for petitioner's contention that the nexus between his own criminal conduct and the insurance company's pecuniary loss was too speculative or attenuated to warrant congressional concern.

The base offense defined by Section 844(i) is a crime against *property*: the prohibited act is the malicious "damage[] or destr[uction]," by specified means, of "any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."[16]

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[15] "Subrogation is the right of the insurer to be put in the position of the insured in order to pursue recovery from third parties legally responsible to the insured for a loss paid by the insurer." 16 George J. Couch, *Couch on Insurance* § 61:1, at 75 (1983). It "is the mode which equity adopts to compel the ultimate discharge of the debt by him who, in good conscience, ought to pay it." *Id.* § 61:20, at 98. By fulfilling its contractual obligation to compensate the Walkers for their loss, the insurer in this case was subrogated to the Walkers' right of action (up to the amount of the claim paid) and could have pursued any claim against petitioner that the Walkers might have asserted. See, *e.g.*, *Phoenix Ins. Co.* v. *Erie & Western Transp. Co.*, 117 U.S. 312, 320-321 (1886); *Allstate Ins. Co.* v. *Mazzola*, 175 F.3d 255, 260-261 (2d Cir. 1999); *Commercial Union Ins.* v. *Bituminous Cas. Corp.*, 851 F.2d 98, 100-101 (3d Cir. 1988).

[16] Section 844(i) is often referred to as an "arson" statute, and arson is that Section's closest common-law analogue. Common-law arson, however, was an offense against the person. Although the potential for widespread property damage was in part responsible for the treatment of arson as an especially heinous crime, "[t]he primary purpose of common law arson was to preserve the security of the habitation [and] to protect the dwellers within the building from injury or death." John Poulos, *The Metamorphosis of the Law of Arson*, 51 Mo. L. Rev. 295, 299-300 (1986) (footnote omitted). Under the common-law conception of the arson offense, "the protection of [the occupant's] property interest was purely incidental to the protection afforded the dweller." *Id.* at 324. As arson statutes have developed over the years, however, the offense has been redefined (at least in significant measure) as a crime against property. See *id.* at 324-335. Section 844(i) is in keeping with that trend, while providing enhanced punishment when injury or death results from the crime.

The economic damage done by petitioner's crime was not an ancillary or peripheral consequence of the Section 844(i) violation: it was the very core of the offense. The incidence of that economic loss was borne by a commercial business headquartered in Wisconsin. And the insurer's loss was not the result of any fortuitous or unforeseeable chain of circumstances, but arose out of a pre-existing contractual arrangement. There is consequently nothing "attenuated or *de minimis*" (Pet. Br. 47) about the interstate commercial effect of petitioner's conduct. To the contrary, that effect was significant in dollars and cents; and petitioner's crime was the proximate cause of the insurer's loss.

2. Petitioner's crime also significantly threatened financial interests of the mortgage company. The mortgagee held a security interest in the property, and destruction of or damage to the residence would substantially impair the value of that security. The mortgagee therefore had a direct financial stake in the physical integrity of the Walkers' home. While the loss in this case was ultimately borne by an out-of-state insurer rather than the mortgagee, the fire created a significant *potential* risk to the mortgagee's financial

interests.[17] The mortgagee's property interest in the real estate, and its consequent financial stake in the physical integrity of the residence, were sufficient to make the house an appropriate subject of federal concern.

3. Finally, although the government's evidence at trial did not establish any actual effect on the Walkers' receipt of natural gas, the potential impact of the crime on gas deliveries provides an independent, concrete link to interstate commerce. Destruction of the house, or damage sufficient to cause prolonged vacancy, would have decreased the volume of gas delivered through interstate channels to the Walkers' residence. As the Seventh Circuit has explained, "straightforward economic analysis" supports the application of Section 844(i) to buildings receiving gas from out-of-state sources "because arsons that interrupt the interstate delivery of supplies affect the volume of interstate shipments of those supplies." *United States* v. *Hicks*, 106 F.3d 187, 190 (1997).

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[17] If the damage caused by petitioner's offense had not been covered by insurance, the mortgagee under general principles of property law would have had a cause of action against petitioner for the impairment of its security. Restatement (Third) of Property (Mortgages) § 4.6(d), at 263 (1997); *id.* cmt. b, at 265; *id.* cmt. h, at 275. The mortgagee's cause of action against a third party tortfeasor like petitioner is one aspect of its right to prevent or redress conduct (whether by the mortgagor or others) that diminishes the value of the mortgaged property and thereby impairs the mortgagee's security. See generally *id.* § 4.6, at 262-263.

C. Section 844(i)'s Jurisdictional Element Ensures That The Statute Is Limited To Property, And Offenses, Having A Constitutionally Sufficient Nexus To Interstate Commerce

1. The Court in *Lopez* made clear that congressional power under the Commerce Clause "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." 514 U.S. at 557 (quoting *Jones & Laughlin Steel*, 301 U.S. at 37). If Congress were authorized to regulate all activity that could theoretically have some distant downstream effect on interstate commerce, its powers would be effectively unlimited. See also *id.* at 567 ("There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce."). Section 844(i)'s jurisdictional element, consistent with its underlying constitutional source, must therefore be applied in a manner that distinguishes between crimes that are within the zone of federal power and those that are not.

The question, as *Lopez* perceived, "is necessarily one of degree." 514 U.S. at 566. While a constitutional boundary exists between "what is truly national and what is truly local," *id.* at 567-568, *Lopez* cautioned that efforts to capture the distinction "are not precise formulations, and in the nature of things they cannot be." *Id.* at 567. Criminal activity may have both intensely national and intensely local dimensions. The destruction of individual residences by arson surely has

a sharp and immediate effect on the victims and the local community. But the property that is damaged or destroyed by the crime also may be integrally tied to interstate commercial activity, whether through the legal and financial arrangements made for its purchase, sale, or protection, or through the demands it directly places on interstate resources. The Court has not endorsed the proposition that "Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Lopez*, 514 U.S. at 558 (quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 197 n.27 (1968)). But no such concern is raised by a law that protects the physical integrity of property, whether residential or commercial, based on its use in an activity affecting interstate commerce.[18]

Application of Section 844(i) on facts like the ones in this case therefore does not exceed constitutional bounds. An attempt to burn or destroy a home does not necessarily represent a simple local crime; rather, it can

[18] Application of Section 844(i) to petitioner's conduct does not create friction with state prerogatives. Congress has expressly disclaimed any intent to preempt state laws in this area absent a "direct and positive conflict" between federal and state law. 18 U.S.C. 848. Congress has recognized that the conduct prohibited by Section 844(i) is also criminal under state law. See, *e.g.*, *1970 House Hearings* at 72. It deliberately chose to create overlapping federal and state jurisdiction for crimes involving the destruction of property by fire and explosives, leaving it to prosecutorial officials to determine on a case-by-case basis whether a particular prosecution is most appropriately undertaken in state or in federal court. Such decisions typically involve cooperation between federal and state authorities and are rarely a source of conflict. See Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 Case W. Res. L. Rev. 921, 963-968 (1997).

and often will create a practical danger of interstate economic loss by invading the legally protected interests of out-of-state commercial actors. Congress is surely empowered to punish criminal acts against property when those acts directly expose identified out-of-state businesses to economic harms grounded in their contractual and legal interests. Proof that a residence received out-of-state natural gas also provides a basis for federal jurisdiction under Section 844(i). While a utility company typically has no legal entitlement to sell any particular volume of gas, and therefore suffers no actionable harm as a result of the offense, a reduction in the flow of interstate gas shipments is a readily foreseeable consequence of damage to or destruction of a dwelling supplied by interstate sources. The aggregate commercial effect of all such reductions would be substantial. A building's receipt of out-of-state natural gas thus provides an independent, constitutionally sufficient basis for the application of Section 844(i).[19]

2. As petitioner correctly observes (Br. 45), a court's role in applying a statute that contains a jurisdictional element differs from its role in implementing other

[19] Recognizing federal authority to protect buildings that have interstate utility links does allow a broad reach to federal power. If that nexus would extend federal jurisdiction to the destruction of most buildings, however, that is because the interstate economy reaches, and vitally depends on, commerce with those buildings. Acceptance of that proposition does not mean that Congress may regulate all violent crime against persons on the theory that all persons "consume" out-of-state goods and that injury to them would likely reduce such consumption. Rather, proof that a particular building receives out-of-state gas establishes that its destruction by fire or explosives will disrupt an ongoing and continuous commercial relationship, and will thereby inflict concrete economic harm on *identified* commercial actors.

Commerce Clause legislation. When "Congress itself has said that a particular activity affects the commerce, * * * the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power." *Darby*, 312 U.S. at 120-121. Thus, where Congress has defined a class of activity without reference to an "in commerce" or "affecting commerce" element, and has determined that all conduct within the class is prohibited, courts do not inquire case-by-case into interstate commerce connections. See *Perez*, 402 U.S. at 152-154.

By contrast, the purpose and function of an express jurisdictional element is to "limit [a statute's] reach to a discrete set of [activities] that additionally have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562. Some jurisdictional elements do this by identifying particularized links to commerce that the government must prove.[20] See, *e.g.*, 18 U.S.C. 2119 (carjacking offense applies to a "motor vehicle that has been transported, shipped, or received

[20] This Court in *Lopez* cited with approval former 18 U.S.C. App. 1202(a) (1976) as an example of a statute limited "to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." 514 U.S. at 562. That Section prohibited convicted felons from "receiv[ing], possess[ing], or transport[ing] in commerce or affecting commerce * * * any firearm." 18 U.S.C. App. 1202(a) (1976); cf. 18 U.S.C. 922(g). In *Scarborough* v. *United States*, 431 U.S. 563 (1977), this Court recognized that, under its prior decision in *United States* v. *Bass*, 404 U.S. 336 (1971), the government was required to prove some nexus to interstate commerce in order to establish the possession offense. See 431 U.S. at 567-568, 575. The Court found that the jurisdictional element was satisfied by proof that the firearm in question had moved in interstate commerce at some time in the past, *id.* at 575, explaining that "Congress intended no more than a minimal nexus requirement," *id.* at 577.

in interstate or foreign commerce"). Others, such as Section 844(i), mandate a case-by-case inquiry but under a standard that invokes the full sweep of Congress's "affecting commerce" power. In the latter instance, there are many ways by which the requisite connection to commerce may be shown.

In *Russell*, the Court identified the class of properties to which the property at issue in the prosecution belonged (rental property), and then determined that the class had a sufficient connection to interstate commerce to justify application of the statute. As the Court explained, "[t]he congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class." 471 U.S. at 862 (citing *Perez*). It is also permissible to identify the particular connections to interstate commerce that the property at issue has and, when those connections are explicit and not attenuated, to ask whether the class of property having similar characteristics will in the aggregate have a "substantial relation" to interstate commerce. *Lopez*, 514 U.S. at 559. Either manner of proof ensures that the exertion of federal power against what might otherwise be viewed as a local crime serves to protect interstate commercial activity.

The requirement of a genuine connection between a particular property and interstate commercial activity does not mean that the government must prove an *actual effect* on interstate commerce in an individual Section 844(i) prosecution. Still less does it require a "substantial effect" on commerce on the facts of each case.[21] The nature of commerce is that a large number

[21] Requiring proof of a "substantial effect" on the facts of each case would require judicial line-drawing that would likely produce

of arguably insubstantial effects produce, in the aggregate, huge effects. Petitioner concedes (Br. 32-33) that effects on commerce may be aggregated to meet a constitutional substantiality requirement, but he would limit (Br. 34-35) that mode of analysis to circumstances involving commercial activity (and then only when intrastate and interstate activities are "commingled" or when regulation is "essential" or "appropriate" to prevent injury or disruption to commerce). There is no constitutional basis for that restriction. Congress may not trace the effects of non-commercial activity into the stream of commerce by piling "inference upon inference" in a highly attenuated fashion. *Lopez*, 514 U.S. at 567. That principle, however, does not bar regulation of non-commercial activity (such as violent crime) that *directly* affects interstate commerce (such as identified insurance companies and mortgage lenders) and that, in the aggregate, exerts a substantial effect on interstate commerce.

"The contention that in Commerce Clause cases the courts have power to excise, as trivial, individual instances falling within a rationally defined class of activities has been put entirely to rest." *Maryland* v. *Wirtz*, 392 U.S. at 192-193; accord *Perez*, 402 U.S. at 154. The Court has applied that principle both to

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arbitrary outcomes. Here, for example, the insurable interest in the property damaged by petitioner's crime was plainly "substantial"; the effect of the crime was to trigger the insurer's legal obligation to make a payment of more than $75,000 across state lines. There is no clear reason why the result should be different, however, if the damage were only $7,500 or $750, or if there were no damage at all because (as in *Russell*) the fire failed to catch. Petitioner's position would nevertheless require the courts to draw such impressionistic distinctions as a matter of constitutional law.

Commerce Clause statutes that contain a jurisdictional element and to those that do not. Compare *Wirtz*, 392 U.S. at 188-193 (applying principle to law containing a jurisdictional element) with *Perez*, 402 U.S. at 150-154 (same for statute that did not contain a jurisdictional element). That point clearly emerges from *Russell*, which upheld a Section 844(i) conviction for the *unsuccessful attempt* to set fire to a building. See 471 U.S. at 859 & n.1. By showing that the building was used as rental property, the government established the requisite nexus to commerce, even without proof that Russell's crime had any actual commercial effect. Similarly, proof that a residence is mortgaged to and insured by out-of-state businesses (and receives gas from out-of-state sources) shows that its destruction by fire would pose a significant risk of harm to interstate commerce. Protection of the home is therefore an appropriate subject of federal regulation, regardless of whether (or to what degree) the harms materialize in a particular case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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